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October 21, 2019

Office of Water
United States Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
cwa401@epa.gov.

Subject: Docket ID No. EPA-HQ-OW-2019-0405

The North Dakota Department of Environmental Quality (DEQ) is responsible for the development, adoption and implementation of water quality standards and the authority over section 401 clean water certification for the State of North Dakota. The DEQ is committed to adopting water quality standards that protect public health and welfare, enhance the quality of water serving the State's beneficial uses and the uses as defined in sections 101(a)(2) and 303(c) of the Clean Water Act (CWA). The DEQ issues section 401 certification collaboratively with federally regulated/permitted actions to ensure the support of the water quality standards as intended by the CWA. The DEQ grants clean water certification or conditioned certification in a timely fashion, usually less than 20 days, and bases its decisions on the science and the law.

The DEQ welcomes this opportunity to comment on the proposed rules addressing procedural requirements of water quality certification under the Clean Water Act section 401. The DEQ supports the intended purpose of the new rules [to increase the predictability and timeliness of section 401 certification], however there are sections of the proposal that could encroach on the State's ability to protect its water quality from a federal project or a project that a federal agent or agency is a proponent as intended in section 401 of the CWA. Any encroachment on the State's authority will disrupt North Dakota's well-established state-federal collaborative process. The following comments address these concerns. Should you have questions please contact Karl Rockeman, P.E. at (701) 328-5210 or krockema@nd.gov.

Comment 1: Subpart B - Certification Procedures. Where a Federal agency determines that a certifying authority's denial did not satisfy the requirements of Clean Water Act section 401, and If the Federal agency determines that a condition does not satisfy the definition of § 121.1(f) and meet the requirements of § 121.5(d), such condition shall not be incorporated into the license or permit.

Certifying or conditioning a certification is an important tool to ensure the State's water quality standards are being supported while allowing the permitted activity to proceed. Conditioning a certification is used to prevent foreseeable impacts and releases based on experience and specific knowledge of the regions, rivers and lakes. Placing the authority to decide what is appropriate to condition or deny in the hands of a federal agency threatens the loss of this useful tool.

Section 401 of the CWA recognizes that the States are the expert on their waters and backs this by granting primacy over water quality standards. This simple act affords North Dakota the ability to maintain the chemical, physical and biological integrity of our waters. The current proposal acknowledges that federal agents and agencies likely lack the expertise to protect our waters with the language: *"The EPA expects that the proposed requirements are clear and specific enough that a federal agency would not need to have water quality expertise to determine if a certification condition meets the proposed requirements."*

More importantly this amendment would allow a federal agency to avoid section 401 of the CWA. Not only is that directly in opposition to the intent of the law, but it would result in a loss of trust between state and federal agencies on federal projects or projects that the federal agency is a proponent.

The DEQ proposes that instead of limiting the interpretation of what is supporting the water quality standards, require the federal regulatory agency to work collaboratively with the DEQ in developing State specific practices and conditions that can be inserted as needed.

Comment 2: Subpart B - Certification Procedures. Establishing the reasonable period of time. The Federal agency will provide: (1) The applicable reasonable period of time to act on the certification request, (2) The date of receipt of the certification request, and (3) The date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request.

The NDDEQ's normal turn around for a 401 Certification is within 20 days of a request. In the rare event it takes longer, it is due to inadequate or lacking information on the potential discharges.

It is being proposed that any additional information required to assess potential impacts, must be gathered within the federally set reasonable period of time. There are types of data that cannot be collected in all seasons or during high water [i.e., sediments for elutriate extraction and element analysis]. Without the ability to add additional time to gather this type of information a permit request would be denied instead of delayed.

The DEQ proposes to change the language to: **Subpart B - Certification Procedures. Establishing the reasonable period of time. The Federal State agency will provide: (1) The applicable reasonable period of time to act on the certification request within 30 days of receipt of the request for certification, (2) The date of receipt of the certification request, (3) The date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request, and (4) The state determination [reasonable time frame] may be appealed by the applicant to the federal district court.**

Sincerely,

A handwritten signature in black ink, appearing to read 'Karl Rockeman', with a stylized flourish at the end.

Karl Rockeman

Director

Division of Water Quality